

SOC 3395: Criminal Justice & Corrections
Overheads Class 12: Pretrial Criminal
Procedures 2

* Today we continue our look at pre-trial procedures

Search & Seizure:

* Search & seizure under the Charter:

- s.8: the right to be secure from unreasonable search & seizure

- s.24(2): the exclusion of such evidence

* Both protect the individual right to privacy

* Three relevant areas of law:

- common law: general body searches & surrounding area

- s.487 of Criminal Code: obtaining search warrants

- s.487.05 of Criminal Code: obtaining search warrant for DNA

Requirements for Search Warrants:

(1) Reasonable & probable grounds (i.e. that crime committed)

(2) Particularity (i.e. the place to be searched, what to be seized & why)

Searches Needing a Warrant:

* Before issuing a warrant, a JP must decide on whether reasonable grounds exist

* Courts have been split on the procedure to determine “reasonableness” under s.8 of the Charter: (i.e. before or after) If possible, it is best to determine beforehand:

- police have to assess reasonableness before acting
- Judges will have the exact information police used when ruling
 - on legality
- decision/assessment made by a neutral individual

Warrantless Searches in Exigent Circumstances:

* Some warrantless searches may be deemed reasonable under the circumstances (but police can’t simply go on “fishing expeditions”)

* Examples:

- (1) Hot pursuit (to prevent bodily harm, death, or loss of evidence)
- (2) Minor technical defects
- (3) More leeway given in drug cases to prevent destruction of evidence

* Considerations by court:

- (1) whether preceding information compelling
- (2) whether based on credible informant’s tip
- (3) whether corroborated by prior police

investigation

(4) Accused's past record & reputation

Searches Incident to an Arrest:

* Suspects may be searched for weapons/evidence without a warrant if their arrest is itself lawful (i.e. based on reasonable grounds)

* Searches incident to arrest have been allowed when:

- (1) Needed to protect arresting officers
- (2) Needed to protect destruction of evidence
- (3) Intrusiveness of the arrest is so great that the incidental search is minor
- (4) The individual could be subjected to an inventory search at police station

* Nevertheless, police must inform suspects of right to counsel

* Limitations to this power:

- (1) Necessity (i.e. for effective/safe application of law)
- (2) Must be for valid criminal objective (e.g. weapons search)
- (3) Cannot be used to intimidate, pressure or ridicule accused
- (4) Cannot be done in an abusive way

Warrantless Searches in Motor Vehicles:

* Warrantless searches of cars OK if reasonable grounds exist for believing drugs/contraband present

* Mellinthin case: stop checks for drunk drivers dangerous vehicles don't justify searching bag with no reasonable grounds

Other Types of Warrantless Searches:

* Three types:

(1) Plain view doctrine: further search/seizure OK if illegal object Openly visible

(2) "Reasonable grounds" that an offence is being committed/ has been committed

(3) When individual voluntarily consents (police must prove)

Electronic Surveillance:

* Courts can authorize wiretaps / electronic surveillance & evidence so obtained may be used in criminal cases (very few applications rejected)

* If police act in good faith, such evidence doesn't violate Charter

* Electronic surveillance without prior judicial authorization violates s.8 of Charter

* Video surveillance of area with "reasonable expectation

of privacy” without prior judicial authorization violates s. 8 of Charter

* Unlike some countries (e.g. U.S., U.K., Canada’s laws have not kept up with technology). Critics argue this makes it easier for organized crime and terrorists

* Bill C-74 attempted to update laws, but died on order paper. Controversial among civil libertarians

Stay of Proceedings:

* Judicial discretion exists to stay proceedings in very old cases (where offence occurred many years before charges laid)

* Not typically done for sexual offences

* Fairness of trial is not necessarily jeopardized by lengthy delay

* If parties come to an understanding beforehand, & authorities told accused wouldn’t proceed, then situation may be different

Legal Aid:

* s.10(b) of Charter gives right to retain & instruct counsel without delay. Thus important to consider legal aid

* Courts have held police must inform suspects of existence/availability of duty counsel/legal aid in area, including toll-free number

* Court decisions have expanded legal aid entitlement beyond initial court appearances (e.g. appeal or parole revocation hearings)

* Before legal aid existed, accused of limited means were discriminated against on the basis of wealth & income

* Gideon v. Wainright: established legal aid as a constitutional right

* Canadian legal aid began in Ontario in 1967 (in place across Canada by end of 1970's, following federal funding in 1973)

* Government funding peaked in mid 1990's, has been cut back since - resulting in a patchwork of services, no national standards, & leaving only "poorest of the poor" eligible.

* The philosophy of the law (though not necessarily the courts) suggests that eligibility for legal aid should be broadened

* Currently 3 models of legal aid delivery are used in Canada:

(1) *Judicare model* (Ontario, N.B., and Alberta):
Qualified applicants get a certificate/ choose own lawyer

- lower cost
availability

- increased

- one lawyer handles case areas well - serves rural areas well

(2) *Staff system* (Sask, NFLD, N.S., & Yukon): legal counsel work for the government

- staff counsel work together - efficiencies of centralization
- enables specialization

(3) *Mixed system* (P.E.I., Man., Quebec, Territories): choosing either staff or private counsel from a list

* Conviction rates don't vary by type of program, though sentences do

- judicare: more jail terms/ discharges
- staff: more probation, restitution, community work & fines

* Aboriginal offenders criticize system as ineffective / little choice

Conclusion:

* Pretrial procedures are important, largely concern the actions of the police, & are subject to various limits set by the Charter

Other controversial issues, like bail reform, electronic surveillance & legal aid will continue to work their way through the courts